

SEP 5 1978

MICHAEL RQDAK, JR., CLERK

No. **78-379**

In The
Supreme Court of the United States
October Term, 1978

W. J. HOUSE, SUPT., ETC., ET AL.,

Petitioners,

v.

JAMES C. STEWART, ETC., ET AL.,

Respondents.

Petition for a writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit
and Appendix

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IN THE

Supreme Court of the United States

October Term, 1978

No. _____

W. J. HOUSE, SUPT., ETC., ET AL.,

v.

JAMES C. STEWART, ETC., ET AL.,

Petitioners,

Respondents.

*Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit granting the appellees-respondents' motion of summary affirmance of a final judgment of the United States District Court for the Middle District of North Carolina, wherein originally the petitioners were plaintiffs and the respondents were defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears as Appendix A to this petition, and is unpublished. The opinion and judgment of the United States District Court for the Middle District of North Carolina appear as Appendix B to this petition, and the opinion is reported at 83 Labor Cases ¶133,636 (CCH Labor Law Reports).

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on June 5, 1978, was not published, and appears as Appendix A of this petition. The jurisdiction of this Court to review by writ of certiorari the decision in question is conferred by Title 28, United States Code, §1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in granting the appellees-respondents' motion for summary affirmance of the final judgment entered by the District Court in favor of the respondents holding that the petitioners, the Superintendent of the Greensboro, North Carolina, City Schools and the Chairman and members of the Greensboro City Board of Education, as employers, are subject to the equal pay provisions of the Fair Labor Standards Act?

APPLICABLE STATUTES

The statutes applicable to this petition are 29 U.S.C. §201, *et seq.*, including 29 U.S.C. §206(d), and said sections are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This suit, instituted by the Superintendent of the Greensboro City Schools and Chairman and members of the Greensboro City Board of Education, involves the application of the equal pay provisions of the Fair Labor Standards Act to an agency of a political subdivision of the State of North Carolina. The petitioner school board contends that application of the equal pay provisions to the Board and its employees (1) is not sustainable under the Fourteenth Amendment to the United States Constitution, (2) is not within the authority granted Congress by the Commerce Clause, Art. 1, §8, cl. 3, of the United States Constitution, and (3) ignores the doctrine of *stare decisis* because the United States Supreme Court held, in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), that the entire Fair Labor Standards Act, including its equal pay provisions, does not apply to the category of employers that includes the petitioners.

On April 20, 1977, the petitioners brought this suit in the United States District Court for the Middle District of North Carolina against the respondents, the Secretary of Labor and his authorized representatives, pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.*, 28 U.S.C. §1331, 28 U.S.C. §1332, 28 U.S.C. §1337, 28 U.S.C. §1361, 29 U.S.C. §206(d), and 29 U.S.C. §216(b) and (c). The amount in controversy in this action is in excess of \$10,000.00 exclusive of interests and costs. The petitioners sought entry of an appropriate decree that the Board and its employees are not subject to the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* The petitioners contended, based upon the rationale of *National League of Cities v. Usery*, 426 U.S.

833, 96 S.Ct. 2465, 49 L.Ed.2d 245, 44 U.S.L.W. 4974 (1976) and upon the decisions reached in *Howard v. Ward County*, 418 F.Supp. 494 (D.N.D. 1976), and *Usery v. Owensboro-Daviess County Hospital*, 423 F.Supp. 843 (W.D. Ky. 1976), that the entire Fair Labor Standards Act, including its equal pay provisions, does not apply to the category of employers that includes the petitioners.

On or about June 16, 1977, petitioners and respondents stipulated the facts and the amount of unpaid back wages owed if it is finally ruled that petitioners are subject to the equal pay provisions, presenting the District Court with the sole question of whether or not the petitioning school board and its employees are subject to the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, including its equal pay provisions, by reason of the Board's status as a public agency, that is, an agency of a political subdivision of the State of North Carolina.

On June 20, 1977, the respondents filed a motion to dismiss the petitioner's complaint arguing that the application of the Equal Pay Act to employees of states and their political subdivisions is unaffected by *National League of Cities v. Usery*, *supra*.

Thereafter, on July 25, 1977, the Fourth Circuit Court of Appeals rendered its decision in *Usery v. Charleston County School District of Charleston County, South Carolina*, 558 F.2d 1169 (4 Cir. 1977). In that case, the Fourth Circuit Court of Appeals held that state and local governments are subject to the equal pay provisions of the Fair Labor Standards Act.

Subsequently, on January 9, 1978, the District Court, refusing to depart from the decision of the Court of Appeals in the *Charleston County School District* case, allowed the respondent's motion to dismiss.

An appeal was taken from that District Court opinion because the petitioners believe that the District Court erred in following the *Charleston County School District* finding that the application of the equal pay provisions to the Board and its employees "is clearly sustainable without reference to the commerce power." *Charleston County School District, supra*, at 1170, n. 9. On or about March 15, 1978, the appellee-respondents submitted in the Court of Appeals a motion to dismiss the appeal or, alternatively, to summarily affirm the judgment of the District Court. Petitioners responded in opposition to that motion on March 22, 1978.

Appellant-petitioners then submitted their Brief and Appendix on March 28, 1978. Subsequently, on April 28, 1978, respondents moved to defer their brief as appellees which motion appellants-petitioners opposed on May 2, 1978. On May 3, 1978, the Fourth Circuit Court of Appeals granted appellees-respondents' motion to defer briefing by appellees.

Thereafter on June 5, 1978, the United States Court of Appeals for the Fourth Circuit granted appellees-respondents' motion for summary affirmance.

REASONS FOR ALLOWANCE OF WRIT

There are two reasons why the Court should grant this petition. The first reason is that the Fourth Circuit decided this important issue of federal law in a way in conflict with applicable decisions of this Court. This conflict is irreconcilable and involves a fundamental principle of constitutional law established by this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), to wit, that when Congress exercises or uses its legislative power under one constitutional authority, then this Court will not uphold that legislation under another constitutional basis. The second reason is that the ruling of the Fourth

Circuit in the present cause is of far-reaching importance to all state and local governments. If that ruling is allowed to stand then numerous state and local governmental bodies and millions of tax dollars will be adversely affected. Already, another case involving this identical issue and many thousands of tax dollars has been adversely influenced by the ruling of the Fourth Circuit in this cause. *Marshall v. Owensboro-Daviess Hosp., et al.*, No. 77-3069 (6 Cir., August 9, 1978), p. 7. Petitioners submit that this issue has been allowed to percolate among the Circuit Courts of Appeal for too long and, in order to secure uniformity of judgments, this Court must grant this writ.

Congress enacted the equal pay provisions of the Fair Labor Standards Act and all the amendments thereto in a *stated exercise* of its powers under the Commerce Clause. Congress did *not exercise* or *use* any of its Fourteenth Amendment power in enacting the equal pay provisions of the Fair Labor Standards Act and in extending those provisions to the states and their political subdivisions. Petitioners do not contend that Congress must state the source of its power to legislate, but when congressional intent is to exercise a given power and where Congress specifically states its sole constitutional basis, then, petitioners submit, the Courts can look no further for congressional authority. In the Court below, the Court of Appeals reasoned that, despite the fact that Congress expressly exercised its Commerce Power in extending equal pay coverage over the states and their political subdivisions, the Congress "could have" extended the equal pay provisions against state and local governments by exercising its power under the Fourteenth Amendment. To quote a phrase used by the Court of Appeals, if Congress "has the power, it has the power" and, the reasoning goes, it is irrelevant whether

Congress chose to exercise that particular power. The Court of Appeals in the present cause did precisely that which this Court refused to do in *National League of Cities v. Usery, supra*, i.e., uphold the equal pay provisions against state and local governments by reading in congressional constitutional authority neither mentioned nor relied upon by Congress at the time of passage. Congress did not base the enactment and extension of either the Fair Labor Standards Act or its equal pay provisions on Section 5 of the Fourteenth Amendment. Congress grounded these provisions in the Commerce Clause and the equal pay provisions must stand or fall, as the minimum wage and overtime provisions have, upon a test of their constitutionality under the Commerce Clause.

In the *Civil Rights Cases*, 109 U.S. 3 (1883), this Court refused to look at the Commerce Clause as a possible source of authority for the statutes under attack in that case because the legislative history showed that Congress had relied on the Civil Rights Amendments in enacting the legislation in question. That case stands for the proposition that when Congress refers to a source of constitutional power in legislating the Courts will not uphold the Act on another constitutional basis. When the constitutionality of an act of Congress is in question, the courts will not look beyond the constitutional powers under which Congress explicitly acted to find constitutional authority for the enactment.

The answer to this "could have" argument has been teletyped to the Courts by Mr. Justice Rehnquist in both *National League of Cities, supra*, and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and is a position which was firmly adhered to by the late Mr. Justice Black during his tenure on the Court. This answer, indeed a dispositive one, is that: "We are not here concerned with what the

Congress might have done or might yet do in the future. We are concerned in this case with what the Congress did." *Minor v. U. S.*, 396 U.S. 87 (1969) (Black, Douglas, J., dissenting); *Daniel v. Paul*, 395 U.S. 298 (1969) (Black, J., dissenting); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Black, Douglas, J. J., concurring).

Indeed, Mr. Justice Rehnquist answered this "could have" argument twice in the span of seven days in 1976. *National League of Cities*, at 852, n. 17; *Fitzpatrick v. Bitzer*, 44 L.W. at 5122, n. 9. In fact, Mr. Justice Rehnquist felt compelled to begin the majority opinion in *Fitzpatrick*, *supra*, by expressly finding that Congress was "acting" under the Fourteenth Amendment in 1972 when Title VII was extended against the States. As District Judge Gordon stated, in *Owensboro-Daviess*, *supra*, the Solicitor "offers no reason why a District Court should reach out for the Fourteenth Amendment in construing these amendments or the Act itself when the Supreme Court specifically refused to do this in the *League* case." 423 F.Supp. at 846.

The respondents would urge this Court to uphold the equal pay provisions based on power Congress could have relied upon *but did not*. The Supreme Court specifically declined to adopt this course in *League*:

"We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power, Art. I, §8, cl. 1 or §5 of the Fourteenth Amendment." 49 L.Ed.2d, at 258, n. 17 (Emphasis Supplied.)

In *Fitzpatrick v. Bitzer*, 49 L.Ed.2d at 620, n. 9, this Court suggests that the outcome where Congress was

explicitly acting under §5 of the Fourteenth Amendment would not have been the same had Congress been acting under its Commerce Power as it was in *League*. Neither *Bitzer* nor *League* will support a conclusion that Congress may *accidentally* implement the Fourteenth Amendment as suggested by the respondents.

The second reason for granting this writ is that the question of the applicability of the equal pay provisions of the Fair Labor Standards Act to state and local governments is of far-reaching importance to all state and local governments. The equal pay provisions, as applied to the states *qua States*, operate to displace directly the states' freedom to structure integral operations in areas of traditional governmental functions. *National League of Cities*, *supra*, 96 S.Ct. at 2474 (1976). "Equal pay for equal work," to a degree much more dramatically than the somewhat pedestrian minimum wage and overtime provisions of the Fair Labor Standards Act, puts states and municipalities to the hard choice of either raising taxes or curtailing services, or otherwise reordering their priorities. The respondents remain unconcerned that petitioners may be forced to curtail embryonic athletic programs or reduce custodial services. Yet, this is precisely that which this Court held, in *National League of Cities*, *supra*, that the states were not required to do in areas of traditional governmental functions.

This Court, in *National League of Cities*, *supra*, recognized the significant impact of the provisions of the Fair Labor Standards Act upon state and local governmental bodies not only in terms of increased costs in dollars but also in terms of forced relinquishment of important governmental activities. Petitioners submit that, if the minimum wage and overtime provisions of that Act are intrusive, then the equal pay provisions are doubly intrusive.

Further, the United States District Court for the Western District of Kentucky, in *Usery v. Owensboro-Daviess County Hospital*, 423 F.Supp. 843, 845-846 (1976), found that the application of the equal pay provisions to state and local governments would

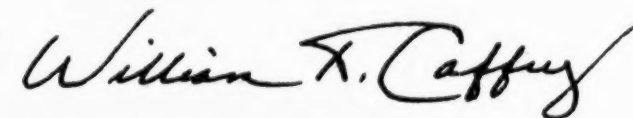
"lead to, and apparently is leading to, chaos, not harmony, in the implementation of the Act as it now exists... The Department of Labor will apparently have power to order equal pay compliance by certain employers yet have no power to order minimum wage compliance to those same employers — even though both provisions arise from the same Act. Such disharmony was obviously not intended either by Congress or the Supreme Court." 423 F.Supp. at 845-846.

The United States Court of Appeals for the Sixth Circuit, citing the Fourth Circuit opinion in *Charleston County School Dist., supra*, disagreed in reversing that District Court on August 9, 1978. *Marshall v. Owensboro-Daviess Hosp., et. al*, No. 77-3069 (6 Cir., August 9, 1978). Petitioners cannot believe that either the Congress or this Court intended this disharmony in the implementation of the Fair Labor Standards Act and the disruption of governmental services that will continue if the ruling of the Fourth Circuit in the present cause is allowed to stand.

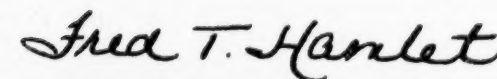
CONCLUSION

For the reasons set forth in this petition, we respectfully submit that certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served on the defendants-respondents by depositing three copies in the United States mail, with air-mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C., 20530, and by depositing three copies in the United States mail, with air-mail postage prepaid, addressed to Donald S. Shire, Esq., U. S. Department of Labor, Room N 2620-A, 200 Constitution Avenue, Washington, D. C. 20210.

This the 1st day of September, 1978.

Fred T. Hamlet

Fred T. Hamlet
Counsel for Petitioner
500 West Friendly Avenue
Greensboro, North Carolina 27402

Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1089

W. J. HOUSE, SUPERINTENDENT
OF THE GREENSBORO CITY SCHOOLS;
WALTER T. JOHNSON, JR., CARSON BAIN,
LACY G. BAYNES, JAMES E. BETTS,
JOANNE BLUETHENTHAL, REVEREND CHARLES F.
KLOTZBERGER AND REVEREND OTIS HAIRSTON,
CHAIRMAN AND MEMBERS, RESPECTIVELY,
OF THE GREENSBORO CITY BOARD
OF EDUCATION, *Appellants,*

v.

JAMES C. STEWART, ASSISTANT
AREA DIRECTOR, GREENSBORO AREA
OFFICE, WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR;
HUGH B. CAMPBELL, ACTING AREA
DIRECTOR, GREENSBORO AREA OFFICE,
WAGE AND HOUR DIVISION,
U. S. DEPARTMENT OF LABOR;
AND F. RAY MARSHALL, SECRETARY
OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, *Appellees.*

Appeal from the United States District Court for the
Middle District of North Carolina, at Greensboro.
Eugene A. Gordon, District Judge.

Submitted: May 8, 1978

Decided: June 5, 1978

Before RUSSELL, WIDENER, and HALL,
Circuit Judges

(William D. Caffrey and Fred T. Hamlet, Jordan, Wright, Nichols, Caffrey & Hill, on brief for the Appellants. H. M. Michaux, United States Attorney, and Donald S. Shire, United States Department of Labor, for the Appellees.)

PER CURIAM:

Appellants, the Superintendent of the Greensboro, North Carolina, City Schools and the Chairman and members of the Greensboro City Board of Education, petitioned the United States District Court for the Middle District of North Carolina for a declaratory judgment that they as employers were not subject to the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* The district court denied relief, and this appeal is before us on the appellees' motion for summary affirmance.

In *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977), we held that the equal pay provisions of the Fair Labor Standards Act were constitutionally valid exercises of Congress' power under the Fourteenth Amendment. As the instant appeal presents no other issues for consideration, we rely on *Charleston County* and, accordingly, grant the appellees' motion for summary affirmance.

TO: Fred T. Hamlet, Esq.
William D. Caffrey, Esq.
H. M. Michaux, Jr., Esq.
Donald S. Shire, Esq.

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 78-1089 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in *fifteen* copies.

When it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

William K. Slate, II
Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

W. J. HOUSE, SUPERINTENDENT OF)
THE GREENSBORO CITY SCHOOLS;)
WALTER T. JOHNSON, JR., CARSON)
BAIN, LACY G. BAYNES, JAMES E.)
BETTS, JOANNE BLUETHENTHAL,)
REVEREND CHARLES F.)
KLOTZBERGER AND REVEREND)
OTIS HAIRSTON, CHAIRMAN AND)
MEMBERS, RESPECTIVELY, OF THE)
GREENSBORO CITY BOARD OF)
EDUCATION,)

Plaintiffs No. C-77-181-G

v.

JAMES C. STEWART, ASSISTANT)
AREA DIRECTOR, GREENSBORO)
AREA OFFICE, WAGE AND HOUR)
DIVISION, U. S. DEPARTMENT OF)
LABOR; HUGH B. CAMPBELL,)
ACTING AREA DIRECTOR,)
GREENSBORO AREA OFFICE, WAGE)
AND HOUR DIVISION, U. S.)
DEPARTMENT OF LABOR; AND F.)
RAY MARSHALL, SECRETARY OF)
LABOR, UNITED STATES)
DEPARTMENT OF LABOR,)

Defendants

MEMORANDUM OPINION

GORDON, Chief Judge

This matter is before the Court for a determination of the defendants' motion to dismiss. For the reasons which follow, the Court concludes that the motion to dismiss should be allowed.

On April 20, 1977, the plaintiffs, the Superintendent of the Greensboro City Schools and Chairman and members of the Greensboro City Board of Education, instituted this action against the defendants pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* In substance, the plaintiffs allege that the defendants, the Secretary of Labor and his authorized representatives, have asserted and are continuing to assert that the Greensboro City Board of Education has violated the Equal Pay Act with respect to the compensation paid to certain of its female custodial employees and athletic coaches. 29 U.S.C. § 206(d). The plaintiffs, fearful of the imminent institution of legal proceedings against them for their alleged violations of the equal pay provisions of the Fair Labor Standards Act of 1938, assert that they are entitled to the entry of an appropriate decree declaring that they are not subject to the equal pay provisions contained in the Fair Labor Standards Act. On June 20, 1977, the defendants filed a motion to dismiss the plaintiffs' complaint on the ground that the complaint shows on its face that the plaintiffs are not entitled as a matter of law to the relief sought in the complaint. Accordingly, this matter is now before the Court for an appropriate disposition of the defendants' motion to dismiss.

Prior to the filing of the defendants' motion to dismiss, the parties to this action entered into a stipulation setting forth the narrow issue to be resolved by the

Court in this action. Accordingly, pursuant to the complaint and stipulations filed in this cause, the Court must now determine whether the plaintiff school board and its employees are subject to the equal pay provisions of the Fair Labor Standards Act. 29 U.S.C. § 201, *et seq.* In this regard, the plaintiffs assert that by reason of their status as an agency of a political subdivision of the State of North Carolina, that they are immune to the equal pay provisions of the Fair Labor Standards Act. 29 U.S.C. § 206(d). On the other hand, the defendants contend that the plaintiffs are subject to the equal pay provisions of the Fair Labor Standards Act.

The parties have filed extensive briefs on the point of law presently before the Court. However, subsequent to the time of the filing of the defendants' brief in support of their motion to dismiss, yet prior to the time the plaintiffs filed their brief in opposition to the motion, the Fourth Circuit Court of Appeals rendered its decision in a case involving the identical issue presented in the plaintiffs' complaint and raised by the defendants' motion to dismiss. *Usery v. Charleston County School District of Charleston County, South Carolina*, 558 F.2d 1169 (4th Cir. 1977). The sole question presented in the *Charleston County School District* decision was whether the provisions of the Equal Pay Act could be applied to state and local governments. In considering this issue, the Court stated that "... there is no doubt that the application of its provisions to state and local governments is a valid exercise of Congress' constitutional authority." *Charleston County School District, supra* at 1170-1171. Following, the Fourth Circuit Court of Appeals held that state and local governments were subject to the provisions of the Equal Pay Act. *Charleston County School District, supra* at 1172.

Absent some compelling reason to the contrary, this Court must follow the law as stated by the Fourth Circuit in resolving the controversy in the present case. Finding no sufficient reason to depart from the court's decision in the *Charleston County School District* case, the Court finds that the plaintiffs are subject to the provisions of the Equal Pay Act and, therefore, the Court concludes that the defendants' motion to dismiss should be allowed.

Accordingly, an order will be entered.

United States District Judge

§
January 6, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

W. J. HOUSE, SUPERINTENDENT OF)
THE GREENSBORO CITY SCHOOLS;)
WALTER T. JOHNSON, JR., CARSON)
BAIN, LACY G. BAYNES, JAMES E.)
BETTS, JOANNE BLUETHENTHAL,)
REVEREND CHARLES F.)
KLOTZBERGER AND REVEREND)
OTIS HAIRSTON, CHAIRMAN AND)
MEMBERS, RESPECTIVELY, OF THE)
GREENSBORO CITY BOARD OF)
EDUCATION,)

Plaintiffs

v.

JAMES C. STEWART, ASSISTANT)
AREA DIRECTOR, GREENSBORO)
AREA OFFICE, WAGE AND HOUR)
DIVISION, U. S. DEPARTMENT OF)
LABOR; HUGH B. CAMPBELL,)
ACTING AREA DIRECTOR,)
GREENSBORO AREA OFFICE, WAGE)
AND HOUR DIVISION, U. S.)
DEPARTMENT OF LABOR; AND F.)
RAY MARSHALL, SECRETARY OF)
LABOR, UNITED STATES)
DEPARTMENT OF LABOR,)

Defendants

No. C-77-181-G
ORDER

For the reasons set forth in an Opinion filed contemporaneously herewith, it is

ORDERED that the defendants' motion to dismiss be, and the same is hereby, allowed.

United States District Judge

January 6, 1977

Appendix C

APPLICABLE STATUTES

The Equal Pay Act of 1963 (EPA), Pub. L. No. 88-38 §3, 77 Stat. 56, 29 U.S.C. §206(d)(1), provides:

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In the "Declaration of Purpose" of Section 2 of the Equal Pay Act of 1963, P.L. 88-38, 77 Stat. 56, it states:

"(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce... to correct [these] conditions... in such industries."